



May 15, 2014

VIA ELECTRONIC MAIL

Freedom of Information Officer
U.S. EPA Region 5 (MI-9J)
77 West Jackson Blvd.
Chicago, IL 60604-3590
r5foia@epa.gov

RE: Freedom of Information Act Request Regarding American Energy Corporation – Century Mine (Ohio EPA Permits Nos. 0IL00091*GD and 0IL00159*AD) and Ohio Valley Coal Company – Powhatan Mine #6 (Ohio EPA Permit No. 0IL00046*DD)

Dear FOI Officer:

This is a request for information on behalf of Earthjustice, Sierra Club, and the Ohio Environmental Council (collectively, “Public Interest Groups”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Environmental Protection Agency’s (“EPA”) FOIA regulations, 40 C.F.R. § 2.107. This request, set forth in detail below, is focused on information related to three National Pollutant Discharge Elimination System (“NPDES”) permits for coal mine operations in Appalachian Ohio.

The Public Interest Groups also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

I. Records Requested

The Public Interest Groups request the following records:

1. Regarding the NPDES permit for American Energy Corporation – Century Mine (Ohio EPA Permit No. 0IL00091*GD):
 - a. All records received, sent, or created concerning the permit. This request is inclusive of, but not limited to, the most recent permit renewal application, any correspondence related to renewal of the permit, and any associated meeting notes pertaining to renewal of the permit. Please provide all such records from July 31, 2006 to the present.

- b. All inspection reports and documents relating to violations of the permit, and any state or federal enforcement activity relating to those violations, from January 1, 2009 to the present.
- 2. Regarding the NPDES permit for American Energy Corporation / Century Mine (Bennoc Refuse Disposal Area) (Ohio EPA Permit No. OIL00159*AD):
 - a. All records received, sent, or created concerning the permit. This request is inclusive of, but not limited to, the most recent permit renewal application, any correspondence related to renewal of the permit, and any associated meeting notes pertaining to renewal of the permit. Please provide all such records from July 31, 2006 to the present.
 - b. All inspection reports and documents relating to violations of the permit, and any state or federal enforcement activity relating to those violations, from January 1, 2009 to the present.
- 3. Regarding the NPDES permit for Ohio Valley Coal Company – Powhatan Mine #6 (Ohio EPA Permit No. 0IL00046*DD):
 - a. All records received, sent, or created concerning the permit. This request is inclusive of, but not limited to, the most recent permit application, any correspondence related to renewal of the permit, and any associated meeting notes pertaining to renewal of the permit. Please provide all such records from June 30, 2004 to the present.
 - b. All inspection reports and documents relating to violations of the permit, and any state or federal enforcement activity relating to those violations, from January 1, 2009 to the present.

For purposes of this request, the term “records” means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), applications, permits, reports, studies, letters, comments, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, “and” and “or” shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if

any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹ EPA’s FOIA regulations contain an identical requirement.² The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.³ These factors are:

- A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² 40 C.F.R. § 2.107.

³ See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

- (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
 - (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
 - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
 - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
- (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
 - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’⁴

The Public Interest Groups’ request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

A. Public Interest Factor

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁵ The Public Interest Groups’ request complies with each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

⁴ Markman, *supra* note 3.

⁵ See 40 C.F.R. § 2.107(l)(1).

The Public Interest Groups seek information related to EPA's oversight of Ohio's NPDES permitting program, in particular as it relates to Ohio EPA's possible renewal of the specific permits for the coal mining facilities identified above. Records regarding EPA's review of or input regarding the NPDES permits identified above, as well as any communications between EPA and its Ohio counterpart or other parties regarding those permits, plainly concern "operations or activities of the government."⁶

ii. The disclosure is "likely to contribute" to an understanding of government operations and activities.

The records the Public Interest Groups have requested bear upon the legal, scientific, and technical basis for renewal of the permits in question. As such, these records are of vital importance to evaluating the possible permit renewals and are necessary for the public to critically assess and fully evaluate each permit's potential compliance with the Clean Water Act and sufficiency to protect water quality and aquatic life in Appalachian Ohio. To the best of the knowledge of the undersigned, the requested records have not already been made public. Thus, disclosure is "likely to contribute" to public understanding of government operations and activities.⁷

iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.⁸ Recent media reports have already drawn public scrutiny to Ohio EPA's coal mine NPDES permits (including the permits identified above) that have been expired for several years and may be renewed in the near future.⁹ Thus, any proposed renewal by Ohio EPA of the permits identified above will receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public. The Sierra Club is the nation's oldest and largest grassroots environmental organization, with nearly 600,000 members and hundreds of thousands additional online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through a radio show, an extensive online information system, web videos, and news reports.

⁶ See 40 C.F.R. § 2.107(l)(2)(i).

⁷ See 40 C.F.R. § 2.107(l)(2)(ii).

⁸ See 40 C.F.R. § 2.107(l)(2)(iii).

⁹ See, e.g., Julie Carr Smyth, *18 coal permits lapsed at Ohio EPA*, Columbus Dispatch, Mar. 12, 2014, available at, <http://www.dispatch.com/content/stories/local/2014/03/12/18-coal-permits-lapsed-at-Ohio-EPA.html>.

The Sierra Club's Beyond Coal campaign is a multi-million dollar effort to "replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built."¹⁰ As part of its campaign, Sierra Club seeks to "keep[] coal in the ground in places like Appalachia and Wyoming's Powder River Basin."¹¹ The campaign participates in dozens of proceedings annually, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and it communicates with them regularly.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.¹² Earthjustice has made safeguarding the nation's waters one of its top priorities. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Water Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act. In addition, Earthjustice has the "ability and intention" to convey this information to the public.¹³ Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media.

The Ohio Environmental Council is the state's most comprehensive, effective and respected environmental advocate for a healthier, more sustainable Ohio. Using legislative initiatives, legal action, scientific principles, and statewide partnerships, the Ohio Environmental Council secures a healthier environment for Ohio's families and communities.¹⁴ The Ohio Environmental Council disseminates information through its website, newsletters, fact sheets, action alerts, webinars, and use of social media. The organization is therefore capable of making the information from this request available to thousands of Ohioans, as well as to relevant elected officials.

The Public Interest Groups have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public. The Public Interest Groups will make any

¹⁰ See <http://content.sierraclub.org/coal/about-the-campaign>.

¹¹ *Id.*

¹² See <http://earthjustice.org/about>.

¹³ See, e.g., Markman, *supra* note 3.

¹⁴ See <http://www.theoec.org/who-we-are>.

newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding these proposed permit renewals. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the requested information.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information the Public Interest Groups seek will contribute “significantly” to the ongoing public conversation about these expired and inadequate NPDES permits specifically, and water pollution from coal mining operations in Ohio generally.¹⁵ None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to evaluating the proposed permit renewals and are necessary for the public to critically assess and fully evaluate each permit’s compliance with the Clean Water Act and sufficiency to protect water quality and aquatic life in Appalachian Ohio. As noted above, the Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding these proposed permit renewals. Releasing this information will, thus, significantly enhance public understanding of the proposed permit renewals and EPA’s oversight over the NPDES permitting process for these sites.

B. Commercial Interest Factor

The Sierra Club is a non-profit organization, registered under sections 501(c)(3) and 501(c)(4) of the tax code. The Ohio Environmental Council is also a non-profit organization, registered under sections 501(c)(3) of the tax code. Earthjustice is a non-profit public interest law organization. The Public Interest Groups have no commercial, trade, or profit interests in this information. The Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts tied to permitting deficiencies at these sites and with the purpose of protecting water quality and aquatic life in Appalachian Ohio. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

¹⁵ See 40 C.F.R. § 2.107(l)(2)(iv).

Please let me know if you have any questions or need clarification on any part of this request.
Thank you for your time and consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'TCmar', with a long horizontal flourish extending to the right.

Thomas Cmar
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tcmar@earthjustice.org

Submitted on behalf of:

Sierra Club
Ohio Environmental Council